A FEW LEGAL OBSERVATIONS PERTAINING TO NATIONALITY

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With the concept of nation-state under challenge from an increased interconnected and globalizing world, the tasks, duties and responsibilities of modern day states and governments towards their citizens is being constantly challenged. This article is an attempt to chart the existing legal boundaries between states specially vis-à-vis the issue of citizenship by looking at the way international law demarks the rights of multiple citizens and the duties of their government(s).

I. CONTEXT

In today's increasingly mobile, interconnected, interdependent and thus integrated world, the process of globalization has accelerated the unbundling of some of the evident components of statehood – a permanent population residing statically in a defined territory and protected by an effective government - that were usually geographically grouped in a stable political community commonly referred to as the nation-state. The two century-old monopolization of authority by states over people's means of movement has suffered a degree of erosion in the face of globalization forces.

The long-held axiom of an individual's exclusive membership in one and only one nation-state is no longer taken for granted by all stakeholders in a world market. Frequent transnational interaction is configuration a wide range of competing new affiliations and plural allegiances mostly rooted in family, professional, cultural, social, sports, religious or related networks that come into play within boisterous civic communities. Strikingly, recent empiric research has revealed that individuals living in multicultural societal settings do not regard their multiple identities as contradicting but rather as mutually reinforcing.

At least two distinct factors may help to explain the vast and strong pressures mounted against nation-states and their sovereignty: the rise in international migration and the emergence of universal human rights protection regimes. International migration has spawned large numbers of people living outside their country of ancestry or origin. According to the final report of the Global Commission on International Migration, the number of international migrants has doubled in the last 25 years and is estimated by the

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* The opinion expressed in this paper is that of the author. It does not in any manner represent the views of the Office of the United Nations High Commissioner for Refugees (UNHCR).

UN's Population Division to stand at close to 200 million. In the same vein cross-national marriages surged and have given way to more and more children born to parents with different nationalities and in addition, sometimes in countries that provide for birthright citizenship ("ius soli") rules.

The advent of universal human rights norms, institutions and supervisory mechanisms further served to constrain state prerogatives and to hold states to account for the well-being and protection of all those within their jurisdiction. Precisely because human rights are owed to all by mere virtue of a person's humanity, these norms crystallize a set of globally agreed basic entitlements that transcend national interests. The human rights movement has also spawned a colorful range of transnational interest groups (women, anti-apartheid and anti-racism, trade unions and environmentalist movements) that have advocated for non-discriminatory and more inclusive citizenship policies. The repeal of long-standing patrilineal citizenship policies that underpinned gender inequalities in the nationality laws of most countries until the 1980s undoubtedly is the merit of women rights advocacy movements and amplified the phenomenon of dual nationality. To put it differently the promotion and protection of individual rights, including access to nationality, is no longer confined to States.

As per evidence collected by research from the World Bank and the IMF the expanding volume of migrant remittances also – surpassing in some countries official development assistance (ODA) bears witness to ever strengthening involvement of diaspora communities with their country of origin. In recognition of the development and investment potential of overseas communities home country government have started to explore innovating ways of maximizing constructive engagement with their diasporas. In what could be termed as attempts to shift from brain drain to brain gain, the reaffirmation of ties with overseas communities, in particular those renowned for their high levels of education, prosperity and professional skills has gained prominence in international relations.

II. NATIONALITY IN LAW

In general nationality is taken for granted. Everyone is supposed to have it. It serves as a basis for the enjoyment of many other rights. It is part of a person's identifying features like a name, an address, or a family. Yet nationality touches at the very heart of a state. An essential attribute of state sovereignty, its function is to define the initial body of citizens of a country. It confers a legal status confirming membership in a political community.

One of the most often-cited definitions of nationality can be found in the International Court of Justice's judgment of the Nottebohm case (I.C.J., 1955, p.23):

".....nationality is a legal bond having at its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties."

Nationality results from and is created under domestic law. As such inevitably its form and substance are bound to vary considerably from country and country. From a

historical perspective, nationality primarily belongs to the "inner kitchen" of states and autonomy in municipal legislation prevailed.

Since international law is devised to preserve the interests of states and to enable their peaceful coexistence, constraints on state powers in nationality matters for long remained very weak. Then again because of the interplay between the nationality decisions of countries it became apparent that state discretion could not be left unfettered lest the risk of interstate friction were to materialize.

The 1930 Hague Convention concerning Certain Questions Relating to the Conflict of Nationality Laws in its Article 1 therefore provided:

"It is for each State to determine under its own law who are its nationals. This law shall be recognized by other states in so far as is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality."

Somewhat paradoxically Article 1 simultaneously reaffirms the principle of state autonomy in nationality questions and sets limits to the power of a state to confer nationality. The next Article nevertheless largely ruled out international activism to resolve nationality claims:

"Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State."

III. HUMAN RIGHTS LAW AND NATIONALITY

Only since the end of the Second World War did the international community commit to an international human rights regime as a normative framework to counterbalance state sovereignty. Henceforth nationality is considered as a basic tenet of humanity owed to all.

Article 15 of the 1948 Universal Declaration of Human Rights sets out for the first time the individual right to a nationality:

1. Everyone has a right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Over the next decades various other international and regional human rights instruments in particular as regards the protection of women and children rights refined the right to a nationality. To mention but a few examples:

- Pioneering the drive for equality-seeking reforms, the 1957 Convention on the Nationality of Married Women (Arts.1-3) secured the independent right to a nationality of married or divorced women. Thereafter the 1979 Convention (Art.9) on the Elimination of All Forms of Discrimination against Women established the

principle of equal rights of men and women as regards acquisition, change or retention of nationality including with regards to the nationality of their children.

- Echoing and deepening the human rights standards in the 1966 International Covenant on Civil and Political Rights (Art.24)), the 1989 Convention on the Rights of the Child sets out the obligation of States to ensure registration of the child immediately after birth and the acquisition of nationality (Art.7).

IV. DUTIES OF STATES UNDER CUSTOMARY LAW

Arguably at least two distinct duties rooted in international conventions and customary law constrains state practices in nationality matters. These negative obligations or interdictions arising from the right to nationality essentially concern the arbitrary denial, loss or absence of nationality: on the one hand, the duty to Prevent, Avoid and Reduce Statelessness, and on the other the general obligation of non-discrimination.

A. Duty to Prevent, Avoid and Reduce Statelessness

Statelessness refers to the legal condition of those without a nationality. It transposes the reality of "neglected" human capital in law. Not claimed by any recognized state as its citizens and notoriously invisible stateless people often include life-long residents of a country, the members of political or ethnic minorities, and women and children who are rendered stateless because their husband or parent is a stateless person. Situations of statelessness most frequently result from state succession, disputes between states concerning the legal identity of individuals, protracted marginalization of specific groups within society, or mass denationalization.

Strong concerns of the international community resulted in consensus to try to eliminate, or at least reduce, the incidence of statelessness. Protracted situations of large groups of people in legal limbo can and do generate tensions and conflict within and between states. Continued dispossession of part of its human capital over time inflicts substantial damage to a state's economic health, social cohesion and above, all weakens its international legitimacy and political credibility. Citizenship, once granted, enables states to broaden their taxation revenues, diversify their professional skill profiles and anchor novel country supporters on a durable basis in a country's political community.

The adoption of the Convention relating to the Status of Stateless Persons in 1954, historically first developed as an annex to the 1951 Refugee Convention, indicated that individual stateless persons warranted to be invested with legal protective status. The 1954 Convention articulates minimum standards of treatment for stateless persons, defined as persons who are not considered a national by any State by operation of its law (Art.1). In order to regulate and improve the status of stateless persons, the 1954 Convention generally provides that the basic human rights of stateless persons must be respected by their country of residence without discrimination on the basis of race, religion, or country of origin.

The 1961 Convention on the Reduction of Statelessness established positive State obligations to grant nationality and avoid statelessness at birth for persons born in the

territory of states who would otherwise remain statelessness. It also calls upon States to grant nationality if one parent of a child was its national at the time of birth and limits the circumstances under which persons might lose their nationality without acquiring another. Since the general principles embodied in both the 1954 and the 1961 Conventions are drawn from nationality legislation and practice in the majority of States, they can be safely assumed to be reflective of an international consensus on the minimum legal standards to be applied to questions of citizenship.

In the European context, the duty to avoid statelessness and the prohibition of arbitrary deprivation of nationality has been elevated to the level of foundational principles. Article 4 of the 1997 European Convention on Nationality makes it mandatory s that the rules on nationality of each State Party be based on these non-negotiable ground rules.

B. The Duty of Non-Discrimination

Core standards of reference in international and national law and codified in numerous international instruments, the principle of equality and equal treatment before the law and general prohibition of non-discrimination on grounds such as race, color, sex, language, religion, political or other opinion, national or social origin underpin the normative order of law-abiding states. In the opinion of the UN Human Rights Committee, when it formulated its General Comment No.18 in relation to Articles 2 and 26 of the International Civil Covenant on Political and Civil Rights, these guarantees come into play "in law or in fact in any field regulated and protected by public authorities."

In the same vein, it is widely held that discrimination on the grounds of national origin constitutes a form of racial discrimination prohibited by international law. Article 5 of the 1965 Convention on the Elimination of all Forms of Racial Discrimination unambiguously obliges States to guarantee the right of everyone, without distinction as to race, color or national or ethnic origin, to equality before the law, particularly in the enjoyment of several human rights, including the right to a nationality.
To mention but one example, the Bundesverfassungsgericht or Constitutional Court of Germany (1983, Decisions of Bundesverfassungsgericht, p.37)

C. Declared Nationality

"A legal requirement for an equal status implying equal duties on the one hand equals political rights on the other hand."

V. FROM AVERSION TO TOLERANCE OF DUAL NATIONALITY

Undoubtedly, widespread suspicion toward divided loyalties motivated states to be staunchly opposed to dual nationality arrangements. Concerns about state tensions over the inability to exercise diplomatic protection, the incompatibility of military service duties, security threats such as the perceived exposure to espionage, or the refusal of recognition of naturalization decisions dominated the opinion of most governments throughout the 19th and the large part of the 20th century. Central among the fears

featured the possibility in the event of war of having to confront Trojan horse or fifth column phenomena. States stuck to an almost exclusive interpretation of domestic jurisdiction, centered on the assumption of perpetual allegiance of a country's subjects.

In 1963, amidst the Cold War climate, many Western European States adopted the Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality. It bore witness to the notion prevailing at the time that having multiple nationalities was undesirable and should be done away with. It obliged states in the event of voluntary acquisition of another nationality to arrange for the renunciation or loss of the previous nationality. In the event of binational marriages and children, the reasoning was that spouses and children should be compelled to choose the one country to which they would pair their allegiance in its entirety, rather than risk creating dubious allegiances, unclear tax implications and possibly conflicting military duties. Yet already this convention stipulated that plurinationals were obligated to fulfill military service in only one contracting State.

Subsequent international instruments e.g the two Protocols added in 1977 and 1993 abandoned the principle of undesirability of plurinationality and allowed for the acquisition of multiple nationalities in the cases of second-generation migrants and spouses of mixed marriages and their children.

The Council of Europe's 1997 European Convention on Nationality (ECN) is, to date, the most comprehensive and advanced regional instrument in the field of nationality. It codifies all major aspects related to nationality: principles, acquisition, retention, loss, recovery, procedural rights, multiple nationality, nationality in the context of State succession, military obligations in cases of multiple nationality and co-operation between States parties. Moreover, the Convention takes a significant step forward in nationality legislation and practice by recognizing habitual residence as a basis for the grant of nationality. The 1997 Convention firmly establishes lawful and habitual residence, of a minimum period of 10 years, as a legitimate means of granting nationality and hence reaches beyond *jus soli* and *jus sanguinis* in determining the link an individual has with a State.

As regard multiple nationality, Chapter V of the ECN encompasses recent European experiences of international migration as it recognizes the interests of immigrants to maintain connection with their country of origin, while attribution of the host state's nationality was also viewed as an key component of full integration there. The ECN leaves states free to determine in their internal law whether nationals who acquire or or possess the nationality of another State retain its nationality or lose it and whether the acquisition or retention of its nationality is subject to the renunciation or loss of another nationality (Art. 15). At the same time it calls upon States to accomodate multiple nationality as a result of birth of marriage (Art. 14).

VI. DIPLOMATIC PROTECTION CHALLENGES

The global advance of universal and regional human rights norms, institutions and supervisory mechanisms have enabled individuals to seek redress and compensation through a variety of quasi-judicial mechanisms and judicial procedures in an autonomous manner. These more recent means of enforcement however do not supplant but rather supplement more traditional channels of diplomatic protection.

With respect to dual or multiple nationals, the traditional view held that no state could exercise diplomatic protection against another state whose nationality the individual had. There appears to emerge a new principle of pragmatism in such instances that gives precedence to the country of effective and dominant nationality over the country of formal nationality. This reasoning fits particularly well with Nottebohm doctrine of an "genuine and effective link when the International Court of Justice ((I.C.J., 1955, p.22) stated that: "International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the center of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children (etc.)"

To put it in other words, the present state of international law favors affording effective protection of individuals even and especially against the states of which they are nationals.

VII. CONCLUSION

Evolving views toward dual nationality reflect the growing willingness of some states to compose with the multiple identities intrinsic to diaspora communities. Sustained advocacy and lobbying campaigns of a number of diaspora movements have focused not only on tax exemptions and investment incentives but also increasingly on suffrage and property rights. The approach taken in Armenia to consider ways of granting an adjunct form of nationality may to some extent be interpreted as a bargaining chip advanced by the government to actively stimulate the maintenance of ties that bind overseas ethnic Armenians to their homeland. The challenge is how to embrace them without endangering their integration elsewhere while at the same time safeguarding cohesion and harmony in the resident society.

Considering that international law remains generally rather distant, neutral and sporadically silent on question of solving disputes involving dual nationals, only the future will tell which overriding directions state practice will adopt. The development of specific bilateral and multilateral accords on issues of double taxation, exercise of political rights, military and other obligations provided a path. A guiding principle should be that primary obligations and of a dual national run to the state of habitual residence or abode.

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